United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued by: CARL JAY NATHANSON
Time: 15 Minutes

75-7458

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN: KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

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P/S

BRIEF OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd.)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd.)

TABLE OF AUTHORITIES (cont'd.)

CONGRESSIONAL MATERIAL

NEW YORK STATUTES

NEW YORK REGULATIONS

OTHER MATERIALS

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STATEMENT OF THE CASE

In 1971 the New York State Department of Social Services promulgated §352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations.[1]

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1. The regulation, originally numbered 18 N.Y.C.R.R. §352.7 (g)(6) was renumbered 18 N.Y.C.R.R. §352.7(g)(7) effective December 10, 1971, stated at the time:

"(g) Payment for services and supplies already received. Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

(7) For a recipient of public assistance who is being evicted for non-payment of rent for which a grant

The regulation was submitted to the administering federal agency, the Department of Health, Education and Welfare (HEW) for approval as part of the New York State plan. In November 1971, and again on December 29, 1971, the Regional Commissioner apprised the State that the regulation did not conform to federal requirements. (48a)* The regulation never received HEW approval.

Plaintiffs-Appellees and their dependent children are recipients of public assistance in New York under the cooperative federal-state Aid to Families with Dependent Children program (AFDC) and receive monthly grants calculated to provide for their familial sustenance needs.[2]

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1. (cont'd.)
has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

2. Section 131-a of the New York Social Services Law [McKinneys' Supp. 197[illegible]75] provides for a schedule of payments to families with dependent children based on the number of individuals in the household. The statewide standard of need is that sum of money minimally required to sustain life, including food, clothing, utilities, furniture, household supplies, laundry and personal expenses. Each social service district establishes a maximum schedule of monthly shelter allowances which is added to the basic needs grant.

* Numbers in parenthesis followed by "a" refer to pages of the appendix.

CYNTHIA HAGANS and her two infant children received a shelter allowance from the Nassau County Department of Social Services in the sum of $165.00, the maximum allowance for her size family under the social services district's rent schedule. Because of an acute housing shortage, she was unable, and the State so conceded, to obtain housing at the scheduled allowance. [See stipulation of facts, dated February 23, 1972]. She rented an apartment in Massapequa, New York, at a cost of $200.00 monthly. "She was simply unable to make up this $35.00 difference with money allocated for other needs." Hagans v. Wyman, 462 F. 2d 928,930 fn 2(2d Cir.1972) As a result, she accumulated arrears and was unable to pay the December 1971 rent. She was evicted from her apartment in January 1972. The same month, an emergency rent disbursal of $175.00 was made by the Nassau County Department of Social Services to rehouse the family. This payment was recovered in full during the subsequent month leaving CYNTHIA HAGANS and her two children with but $17.00 for an entire month's basic needs. (Stipulation of facts dated February 28, 1972).

Each plaintiff for various reasons was unable to pay her rent, and was threatened with eviction for non-payment.[3]

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3. The regulation mandates recoupment regardless of fault. While the district court noted that the named-plaintiffs were without fault in the management of the proceeds of their grants the Court also observed that "Recipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds alloted

To prevent eviction, emergency rent payments were made by the local Department of Social Services. These payments characterized as "advances" by the State, were deducted or "recouped" from the recipients' subsequent familial grants of assistance pursuant to the mandate of the recoupment regulation.[4] During the period of recoupment, when the grant for basic needs was reduced, plaintiffs had no other additional income or resources to meet the families' basic needs. [Stipulation of facts dated February 28, 1972].

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3. (cont'd.)
at times it is for reasons beyond their control." Moreover, evictions for non-payment of rent may really be the fault of insufficient shelter allowances. Indeed, CYNTHIA HAGANS' difficulty arose because her shelter allowance was below her actual rent needs. See Memorandum of Decision on Settlement of Judgment, Mishler, C.J. dated March 14, 1972. Hagans v. Wyman ___ F. Supp. ___ (E.D.N.Y. 1972).

4. Although the State has previously argued that the recoupment regulation does nothing but provide a convenient method of recovering the "advance" allowance, such contention does not withstand scrutiny, inasmuch as the Social Security Act explicitly prohibits "advance" allowances in the form of accelerated payments or repayable loans. It deals only in terms of present need, as determined each month. See 45 C.F.R. §233.20(a)(3)(iv)(b). See HEW amicus brief, 1972 (33a).

THE HISTORY OF THESE PROCEEDINGS

On February 10, 1972, plaintiffs commenced this action in the United States District Court for the Eastern District of New York, for themselves and their infant children, and as representatives of recipients similarly situated. They alleged that the New York recoupment regulation violated the Equal Protection Clause of the Fourteenth Amendment and conflicted with the Social Security Act governing AFDC and implementing regulations of the Department of Health, Education and Welfare (HEW). Injunctive and declaratory relief was sought under 42 U.S.C. §1983 and 28 U.S.C. §2201, and jurisdiction was invoked under 28 U.S.C. §1343(3) and (4).[5]

In a Memorandum of Decision and Order filed March 3, 1972, the District Court [Mishler, C.J.] found that the equal protection claim was substantial and provided a basis for pendent jurisdiction to adjudicate the "statutory" claim - the alleged conflict between state and federal law. After hearing, the trial court declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its

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5. Plaintiffs alleged that the New York State recoupment regulation was contrary to the federal statute and regulation because it assumed, contrary to fact, that those funds extended to a recipient to satisfy a current emergency rent need remain available as income for the family's need during the mandated six-month recoupment period.

implementation or enforcement. Hagans v. Wyman, ____F. Supp. _____ (E.D.N.Y. 1972).

On appeal from the District Court's entry of the injunction, the Court of Appeals, without extended discussion, found jurisdiction for the §1983 action under 28 U.S.C. §1343(3). Without passing on the merits of the District Court's finding and conclusions, the Court of Appeals, with one judge dissenting, ordered a remand to the trial court to determine "whether recoupment of past advances from current grants is a 'reduction in grant' so as to bring into effect New York fair hearing procedures." Hagans v. Wyman, 462 F. 2d 928, 931 (2d Cir. 1972).

On remand, the District Court allowed additional parties, who had received fair hearings, to intervene and file a complaint. At the invitation of the Court, HEW filed a memorandum as amicus curiae in which it concluded that "the New York Regulation contravenes federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available." (34-a). Once again, the District Court held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations, and enjoined its enforcement and implementation, Hagans v. Wyman, ____F. Supp.(E.D.N.Y.1972) Cir. 1972).

On appeal, the Court of Appeals ruled that petitioners had not presented a substantial constitutional claim and ordered dismissal of the entire action for want of subject matter jurisdiction. Hagans v. Wyman, 471 F. 2d 347 (2d Cir. 1973).

The Supreme Court granted certiorari on the jurisdictional question.[6] Hagans v. Lavine, 41 U.S. 938 (1973). The Court found the equal protection issue tendered by the complaint to be substantial and ruled that the District Court had jurisdiction under 28 U.S.C. §1343(3) to consider petitioners' statutory claim. The Supreme Court reversed the judgment of this Court and remanded the action for "further proceedings consistent with this opinion." Hagans v. Lavine, 415 U.S. 528, 550 (1974).

The Court of Appeals on April 24, 1974 vacated its judgment and then directed the parties to file additional briefs addressed to the statutory claim. On October 23, 1974, the Court vacated the judgment of the District Court. On February 25, 1975, the Court of Appeals directed the District

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6. George K. Wyman resigned as Commissioner of Social Services on March 31, 1972 and was replaced by ABE LAVINE on May 1, 1972. A substitution of parties was made in the Supreme Court.

Court "to reconsider the issues in the case on the merits in light of the applicable regulations, as amended."[7] On remand, the District Court ruled that 18 N.Y.C.R.R. §352.7(g)(7) as amended contravenes the Social Security Act, 42 U.S.C. §602(a)(7) and (a)(10) and HEW's implementing regulation, 45 C.F.R. §233.20(a) and by judgment dated July 28, 1975, enjoined its enforcement and implementation.[8] (5a-19a).

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7. The New York State Department of Social Services on September 24, 1974 amended the previous recoupment regulation. The present regulation states:

> "For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided upon request to prevent eviction or to rehouse the family. Such allowance may be provided only where the recipient has made a request in writing for such allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of the advance allowance. When there is a rent advance for more than one month, or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of the Title."

8. On September 2, 1975, the Court of Appeals granted appellant a stay of the District Court judgment pending determination of the appeal.

The question presented to this Court is whether §352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations is violative of the Social Security Act (42 U.S.C. §602(a)(7) and (a)(10) and the implementing regulation of the Department of Health, Education and Welfare. [45 CFR §233.20(a)].

INTRODUCTION

A. General Outline of the Federal-State Aid to Families with Dependent Children Programs (AFDC) under the Social Security Act.

The Aid to Families with Dependent Children (AFDC) program is established pursuant to title IV of the Social Security Act, 42 U.S.C. §601 et seq. The program is designed to provide financial assistance to needy dependent children and the parents, relatives or individuals who live with and care for them. The program is "based on a scheme of cooperative federalism," King v. Smith, 392 U.S. 309, 316 (1968) and assists needy people who qualify for aid thereunder through the provision of cash and medical assistance and assistance in the form of social services. States are not required to establish an AFDC program authorized by the Social Security Act but if they elect to do so, they must submit a plan to HEW for the program.9 If the plan meets all applicable federal statutory and regulatory requirements, the

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9. Administration of the welfare programs at the federal level is the responsibility of the Social Rehabilitation Service (SRS), which is the welfare component of HEW.

secretary must approve it. 42 U.S.C. 602(b). By this action, the state becomes eligible for federal financial participation on a percentage basis for expenditures made under these programs, as provided in the payment provisions of Section 603, such payments may be made only with respect to those state expenditures which are made under the plan and in accordance with the federal condition.

The Social Security Act does not authorize the Secretary of HEW to establish or operate an AFDC program in any state. Rather his function is to determine whether the state plan satisfies all applicable federal requirements, and, if so, to provide matching funds for expenditures made by the state pursuant to that plan and within the purview of federal law.[10]

It is the states which are charged with the responsibility of administering the program, including the establishment of a standard of need for each program and a

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10. The Supreme Court in numerous decisions has discussed the structure and basic scope of the public assistance programs. See e.g. King v. Smith, 392 U.S. 308 (1968); Rosado v. Wyman, 397 U.S. (1970); Dandridge v. Williams, 397 U.S. 471 (1970).

determination as to the proportion of that need which will be met under the program. Moreover, under the Act, it is the states that determine the eligibility of each individual, and make or deny payments. The Secretary of HEW relationship is with the states. See generally, 42 U.S.C. 601 et seq. There is no direct relationship between the recipients and the federal government.

The primary basis for entitlement under the AFDC title of the Social Security Act is financial need. The Act itself does not define a standard of need, Each state plan must include a "standard of need,"[11] expressed in money amounts, 45 C.F.R. §233.20(a)(2).

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11. To assure that public assistance is furnished to "needy" individuals, and to provide a mechanism by which income and resources can be taken into consideration in determining need, HEW has long required that a state include in each state plan a "standard of need" i.e., a scale of the income and resources which the state determines is required to maintain a hypothetical family of a given size in a minimal fashion. Typically, the need standard will include at least the amounts necessary for essential subsistence items, such as food, clothing and shelter. The requirement that there be a standard of need is set forth in 45 CFR 233.30(a)(2), which provides as follows:

> "Standard of assistance(i)
> [A State plan] must specify a statewide standard expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment."

Although there is no express statutory authority for mandating the states to specify a standard of need, such standards have been found necessary in order to provide a basis for considering income and resources. The standard of need facilities implementation of the program on a uniform, statewide basis. Rosado v. Wyman, 397 U.S. 397, 408-09 (1970).

This minimum subsistence standard, once established, is used by the state as the "yardstick for measuring who is eligible for public assistance." Rosado v. Wyman, supra, 397 U.S. at 409. The state is given broad discretion in determining the level of benefits and may pay all or a percentage of the standard. Jefferson v. Hackney, 406 U.S. 535 (1972).

Whichever method is used, both eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the state standard of need with the income and resources available to that applicant. 42 U.S.C. §602(a)(7). 45 C.F.R. §233.20(a)(2)(i). See also HEW, Simplified Methods for Consideration of Income and Resources, (1965). Where such a comparison indicates a "budgetary deficit" a state may meet the deficit in full with its assistance grant, or may provide only a fixed percentage of the deficit, or it may limit its payment by imposing a maximum grant which allows payment of the full deficit until the maximum is reached. See generally, Rosado v. Wyman, supra; Jefferson v. Hackney, supra; Dandridge v. Williams, supra, 397 U.S. 471 (1970), 45 C.F.R. §233.20(a)(3)(viii).[12]

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12. 45 C.F.R. 233.20(a)(3)(viii) states the state agency must:
"Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximum or insufficient funds, adjustments will be made by methods applied uniformly statewide."

The assistance grant so determined, provided on a monthly or semi-monthly basis, is intended to cover (at most) an individual or family's basic needs for the monthly or semi-monthly period following receipt of the grant. Where the level of benefits is less than the standard of need, which is the necessary consequence of recoupment, the recipients must make a choice as to which basic items of need deemed essential by the state for their maintenance they and their children will do without during any particular payment period. The one immediate and foreseeable consequence of recoupment is that families who receive reduced benefits without a corresponding reduction in basic needs are on the horns of a dilemma - if they pay their rent they must necessarily use money intended for food [thus they must literally take food out of the needy child's mouth]; or, if they choose to feed their family, they will be unable to pay their rent and will be evicted.

ARGUMENT

POINT I

THE NEW YORK RECOUPMENT REGULATION CONTRAVENES THE SOCIAL SECURITY ACT 42 U.S.C. §602(a)(7) and (a)(10) AND THE IMPLEMENTING REGULATION OF HEW, 45 CFR §233.20

A. Assistance Grants May Not be Reduced to Recoup Prior Rent Disbursals unless the Recipient has Income or Resources Available in the Amount of the Proposed Reduction.

Plaintiffs' argument under §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7) is quite simple.[13] The Social Security Act requires that the states, in computing an individual's benefit, consider only such income or resources as that individual actually has available to him.[14]

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13. 42 USC §602(a)(7) states:

"(a) A State plan for aid and services to needy families with children must:

provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income."

14. These provisions were added to the Act in 1939, Pub.L. No.371, §401(b), 53 Stat. 1370-80, at the request of the Social Security Board (predecessor of HEW) which urged such amendments to make clear what it had already determined to have been implicit in the Act when originally adopted in 1935, namely that assistance was to be based on need as determined according to the financial circumstances of the applicant or recipient. See, e.g., Minutes of the Social Security Board, October 10,1936, House Comm.on Supplemental Appro.Bill for 1936,74th Cong. 1st Sess.(1939), pp. 30-31.

Obviously, Congress did not intend that welfare departments, in computing the grant, would "consider" income which was not, in fact, available to the recipient. Accordingly, from the very beginning of the administration of the program the federal agency charged with the responsibility of administering the program has construed these provisions as permitting only such income or resources which are "actually on hand or ready for use" to be considered by the States in computing the grant.[15]

Under 42 U.S.C. §602(b), the Secretary of HEW is required to approve, for purposes of federal reimbursement, a state plan which "fulfills the conditions" set out in 42 U.S.C. §602(a), including 42 U.S.C. §602(a)(7). In order to inform the states and his own staff of the requirements of federal law, the Secretary promulgates regulations construing the Act. Such construction is the Secretary's elucidation of congressional intent, not his own views of desirable policy or administration.

15. This Social Security Board rule reads:

> "The income or resources shall be actually available to the applicant. To be regarded as available an income or resource must be actually on hand or ready for use when it is needed." Minutes of the Social Security Board, December 17, 1940, Board Document No. 3950-h. See also Minutes of the Social Security Board, December 13, 1940, Board Document No. 3950-g. In 1966 this long held and consistent administrative interpretation of the Act was specifically included in HEW's Handbook of Public Assistance Administration, Pt. IV, §3131(7), but this provision was expressly declared by HEW as not intended to establish new policy but rather to "simply incorporate the existing policy into the Handbook." Handbook Transmittal No. 86, July 6, 1966.

HEW has construed 42 U.S.C. §602(a)(7) as barring recoupment because it was an assumption of income. In light of the less than decisive memorandum on the validity of the challenged recoupment regulation recently submitted by HEW as amicus curiae, it may be helpful to review the manner in which HEW defended the construction urged by plaintiffs in two previous briefs. In its 1970 brief submitted to the Court in Acosta v. Swank, 318 F. Supp. 348 (N.D. Ill. 1970), on remand, 325 F. Supp. 1157 (N.D. Ill. 1971), HEW said:

> "... Congress surely did not intend that individuals covered under the AFDC and AABD programs should be charged with income and resources which are merely assumed to be at their disposal. HEW believes that, while the States are required to consider the individual's income and resources, the State may consider only those items which the recipient actually has at his disposal." [Emphasis in original Acosta brief, p.8].

This, of course, continues to be agency policy, as it must under the statute, and HEW now states:

> "Federal regulations at 45 CFR Section 233.20 govern the circumstances under which State agencies may unilaterally and involuntarily recoup overpayments under Title IV of the Social Security Act, 42 U.S.C. §401, et seq. Only two such circumstances are indicated in the regulations: when the recipient has income or resources exclusive of the current assistance payment in the amount by which the agency proposes to recoup, or when the overpayment was occasioned or caused by the recipient's wilful withholding of income concerning income, resources or other circumstances affecting the amount of

the assistance payment." (21a)[16]

In its Acosta amicus brief, HEW stated with respect to the anti-recoupment regulation then in effect:

> "Obviously, this is merely the application to the particular overpayment principle that the State may only consider income and resources in determining need. Acosta brief, p. 12 [Emphasis added].

As the Court below correctly observed, HEW, in its initial memorandum submitted in 1972 as amicus curiae, had stated categorically that "the recoupment regulation violated federal requirements because it assumed that the recipient had income available out of which the recoupment payment may be taken where there is, in fact, no income available in excess of the regular monthly payment." (16a). After setting out and explaining the available income rule and 42 U.S.C. §602(a)(7) in some detail, HEW said:

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16. The currently effective pronouncement of the agency's interpretation of the income and resources sections of the Act appears at 45 CFR §233.20(a)(3)(ii)(c), which provides:

> "in establishing financial eligibility and the amount of the assistance payment...(c) only such net income as is actually available for current use on a regular basis will be considered and only currently available resources will be considered. [Emphasis added].

> "The critical issue to be determined in the present case revolves around the meaning of the term "available". HEW believes that in those instances in which the state recoups from the recipient's assistance check the amount which the recipient has previously received as an advance rent allowance pursuant to section 352.7(g)(7), it in effect assumes that the funds extended to a recipient to meet an emergency in one month remain available for his support in a subsequent six-month period. This sort of assumption of income availability violates a central tenet of the federal program." [Emphasis added] (39a).

That "central tenet" is, of course, the available income rule. The recipient subjected to a grant reduction to offset a prior emergency rent disbursal, does not have the money expended in the prior month available in the month of reduction, obviously, the basic monthly sustenance needs of the family will go unmet. It is precisely for this reason that the Act and HEW proscribed such offset procedures.

B. The Supreme Court has Consistently Ruled that the "Income and Resources" Clause of the Act, 42 U.S.C. §602(a)(7) and the implementating regulation bars a State from assuming the availability of income in determining a recipient or applicant's need.

The meaning of the "income and resources" clause of the Social Security Act, found at 42 U.S.C. §602(a)(7), and HEW's long standing policy in this regard found in its regulations interpreting this clause, 45 C.F.R. §233.20(a)(3)(ii)(c) has been the subject of interpretation by the Supreme Court in King v. Smith, 392 U.S. 309, 319 n16 (1968) and Lewis v.

Martin, supra, at 555.[17] This interpretation clearly comports with the Act. Id. The Statute excludes from consideration resources or income which are presumed or assumed to be available without any factual basis actually supporting their existence. See King v. Smith, supra, at 319 n.16.[18]

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17. In Lewis the Court again upheld HEW's interpretation of the Act, that a state agency in determining the amount of assistance may consider only income or resources which are "in fact" available to a recipient for current use on a regular basis.

"In the absence of proof of actual contribution, California may not consider the child's resources to include either the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS - whatever the nature of his obligation to support." 397 U.S. at 560.

18. In King, the Court ruled that Alabama could not find a needy child ineligible for assistance simply because of the presence in his home of a "substitute father" who was presumed to support the child regardless of whether he did so in fact. The Court stated:

"Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under §602 to those that are, in fact, available to an applicant or recipient for current use on a regular basis..." "This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual." 392 U.S. at 319,n.16.

The Supreme Court in Shea v. Vialpando, _____ U.S. _____, 94 S. Ct. 1746 (1974) found a Colorado welfare regulation establishing a standardized AFDC work expense allowance to be in conflict with the Act and HEW regulations concerning "income and resources" reasoning that expenses related to the production of income just as income itself must be measured in actuality not presumptions.[19]

Other courts which have considered the meaning of income and resources clause also have come to the above conclusion. See Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969) [income of step-parent without obligation to support] aff'd. 396 U.S.5 (1969); Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd. 409 US 807 (1972) [payment to one child attributed to other children in family]; see also Reyna v. Vowell, 470 F. 2d 494 (5th Cir. 1972) [income of resident minor child]; National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, (D.D.C. 1974).

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19. The Court in Shea stated:

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the individual case after other income and resources are considered. Congress has been careful to ensure that all of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations." Id at 1754.

Thus, the Act and regulations require that each state set a "standard of need" in money amounts, setting forth the state's estimates as to the funds necessary to maintain the standard of living it determines is appropriate in its state. That standard is used to determine the individual need of particular recipients and the amount of their actual payment, 45 C.F.R. §233.20(a)(2)(i). All available income to the recipient is considered "in relation to the state's standard" to determine both financial eligibility and the amount of the grant. 45 C.F.R. §233.20(a)(3)(ii)(a). [The difference between the standard and the recipient's available income may be called the "budget deficit."]

C. The New York Recoupment Regulation is Violative of the Income and Resources Clause of the Act and the Implementing Regulation 45 CFR §233.20.

In permitting the recoupment of the prior emergency rent payments by means of a reduction in current "assistance payments" 18 N.Y.C.R.R.§352.7(g)(7) clearly authorizes a change in the recipient's monthly payment, even though his financial circumstances, apart from the emergency rent payment which has, of course, been expended, have not changed. In so doing, the challenged regulation requires that the state presume conclusively that the rent payment which was expended is currently available to meet the familial sustenance needs during the six-month period of recoupment.[20]

20. In the 1972 memorandum filed as amicus curiae in the case at bar, HEW stated:

New York attempts to avoid compliance with the federal requirements concerning available income and resources by attempting to characterize the emrgency rent payments as an "advance allowance". The flaw in this approach is two-fold. First, the Social Security Act does not permit accelerated payments or repayable loans. 45 CFR §233.20(a)(3)(iv)(b). It deals only in terms of present need, as determined each month. "Moreover, for purposes of claiming federal matching funds, New York treats these disbursals as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans. There is no reason, therefore, to treat these disbursals differently from any other correct payment." 1972 HEW memorandum filed as amicus curiae (41a)

In the Court below, the state argued that the rent advance to prevent eviction has always been considered an overpayment because contending that it is not specifically included in the definition of items of need in 131-a of the

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20. (cont'd.)

"[I]n those instances in which the state recoups from the recipient's assistance check the amount which the recipient has previously received as an advance rent allowance pursuant to §352.7(g)(7), it in effect assumes that the funds extended to a recipient to meet an emergency in one month remain available for his support in a subsequent six-month period." (39a)

Social Services Law. The Court below properly rejected such contention, finding that a payment to prevent an immediate eviction is in a very practical sense grants to meet current needs. (18a) Moreover, New York Social Services Law §106(b) defines overpayments "as payments made to an eligible person in excess of his needs as defined in this Chapter." Clearly, payments made pursuant to §352.7(g)(7) are neither mistaken nor in excess of the recipient's needs during the month paid.[21]

Once the welfare agency determines a recipient's categorical eligibility, and his "need," it must notify the recipient as to the amount of assistance to which he is entitled under the state plan, 45 CFR §206.10(a)(4), which must in turn be based "on the amount of assistance needed," 45 CFR 233.20(a)(3)(viii), and continue assistance in that amount regularly unless and until the circumstances as to need or non-financial eligibility change. See 45 CFR §206.10(a)(5) and Handbook of Public Assistance Administration, Pt. IV, §5200. The New York recoupment regulation authorizes a change in a recipient's monthly grant when his financial circumstances

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21. As HEW correctly observed:

> "An emergency disbursal for rent is issued to meet an actual current need of the recipient. The basis for federal matching of such a disbursal at the time it is made is that it will be spent to satisfy only a need which exists in the month for which the assistance is granted, not that it will be used to permit the recipient to accumulate savings. The Social Security Act does not permit accelerated payments or repayable loans. It deals only in terms of present need, as determined each month."

have not changed. The only basis for such a change in the amount of the grant is if the emergency payment remains available to be considered in the needs determination process. Obviously, a prior payment expended to meet a then current rental need is no longer available. Thus, the only logical conclusion is that New York reduces the grant because it conclusively presumes during the period of the recoupment, the current availability of the rent payment expended to forestall an eviction. Such an assumption is expressly prohibited by the available income rule and the statutory provisions upon which it is based.

Those federal courts which have ruled on similarly drafted recoupment provisions have found that they were not rationally related to the declared purposes of the AFDC program and were, therefore, invalid and under the Social Security Act and HEW regulations.

In Cooper v. Laupheimer, 316 F. Supp. 264, (E.D. Pa. 1970), the District Court, after finding the equal protection claim substantial, invalidated a Pennsylvania regulation that recouped over a two-month period alleged overpayments from a family's assistance grants. The court found the regulation inconsistent with the Social Security Act for several reasons, including, inter alia the punishment of the dependent child by depriving him of a substantial amount of his AFDC assistance because his mother either mistakenly or fraudulently obtained an extra payment months ago. "[T]he state cannot justify its [arbitrary] method of restitution by

asserting that proper management of funds would produce a [cash] reserve. The State cannot permit a child to be starved or be deprived of aid that he needs because of the mother's budgetary mismanagement. The Social Security Act specifies remedies for such a situation...." Id., at 269

In Bradford v. Juras, 331 F. Supp. 167 (Ore. 1971), the District Court found that it had subject matter jurisdiction over the constitutional and statutory challenge to an Oregon regulation authorizing recoupment of overpayments from current assistance grants. Measuring the regulation against the goals of the AFDC program, the court invalidated it as inconsistent with federal law.

"The primary concern of Congress in establishing the AFDC program was the welfare and protection of the needy dependent child." 42 U.S.C.§601: King v. Smith, 392 U.S. 309, 313 ...(1968). This concern is thwarted when recoupment from current grants takes money from the child to penalize the misconduct of its parent."

"...The child-oriented policy of the AFDC program requires that children with equal needs be treated equally. The fact that a parent-recipient has acted wrongfully in the past by withholding information does not justify reducing the subsistence level of her children below that of other needy children." 331 F.Supp., at 170.

In Holloway v. Parham, 340 F.Supp. 336 (N.D. Ga. 1972), an equal protection and due process challenge to a Georgia statute mandating recoupment from future grants for

past unlawful payments was deemed substantial enough to warrant the convening of a three-judge court. Addressing the pendent claim of inconsistency with the Social Security Act and HEW regulations, the court ruled that the law was valid because it required a prerecoupment determination that all or part of the overpayments are currently available to the parent and the children.

D. The Written Consent to Recoupment Exacted by the State as Pre-condition to its Helping a Recipient Avoid an Eviction is Non-voluntary.

Assuming arguendo that an emergency rent payment made under the recoupment regulation constitutes an "overpayment" within the meaning of 45 C.F.R. §233.20(a)(12)(ii)(a)[22] and it is not available to the recipient as income during the period of recoupment, does the written consent to recoupment exacted as a pre-condition to the issuance of the emergency

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22. 45 CFR §233.20(a)(12)(ii)(a) prohibits recoupment of overpayments unless there is money currently available exclusive of the current assistance. However, according to a Program Instruction issued by HEW (ADA-PI-75-11, December 2, 1974) this regulation prohibiting recoupment applies only to involuntary reduction of future grants..

rent payment constitute a voluntary consent? The Court below concluded from all the circumstances surrounding the consent, particularly the lack of any true choice, the consent cannot be held to be voluntary.[23] (18a)

1. The consents exacted from recipients are made under duress.

Duress may be defined as subjecting a person to a pressure which overcomes his will and coerces him to comply with demands to which he would not yield if acting as a free agent. 17 C.J.S. Contracts §168.

As Justice Frankfurter, dissenting in United States v. Bethlehem Steel Corporation, 315 U.S. 289 (1942) observed:

> "Does any principle in our law have any more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken the advantage of the necessities of the other....[C]ourts generally refuse to lend themselves to the enforcement of a "bargain" when one has taken advantage of the economic necessities of the other." Id at 326.

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23. The Court also observed that New York has presented no evidence of the existence of procedures as required by the program instruction to ensure that a recipient's permission for the reduction has not been coerced.

There is great reason and justice in the foregoing rule for necessitous individuals [such as the destitute welfare recipient] are not, truly speaking, free, but to answer a present exigency will submit to any terms the more powerful may impose upon them. As the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 264 (1970) took judicial notice of the welfare recipient's impaired adversary position when it observed that:

> "[a recipient] lacks independent resources, his situation"referring to the termination of benefits"becomes immediately desperate. He needs to concentrate upon finding the means for daily subsistence in turn adversely affects his ability to seek redress from the welfare bureau."

The fact that a recipient consents in writing to a reduction of his grant to forestall an eviction and the loss of a roof over his family's head does not alter the reality of the situation, that he was acting under compulsion. In Union Pacific R.R. Co. v. Public Service Commission, 248 U.S.67 (1918) Justice Holmes stated:

> "It always is for the interest of a party under duress to choose the lesser of the two evils. But the fact that a choice was made according to interest does not exclude duress. It is the character of duress properly so called."

It is hornbook law that courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other.

The written consent of the recipient is analagous to the salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain. See Post v. Jones, 19 How. 150, 160, 15 L. Ed 618.

The courts have refused to enforce such contracts.[24] The District Court properly characterized the choice which the recipient must make between consenting to recoupment or being evicted on a Hobson's Choice. The recipient is forced by his situation to agree to the recoupment.[25] Finally, the

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24. Javins v. First National Realty Corp., 428 F. 2d 1071 (1970) recognized another inequality in bargaining power, that of the tenant in dealing with the landlord." Id at 1079.

25. The state argues that if the regulation is declared invalid, it too will be faced with a Hobson's Choice, forbid the emergency rent payment altogether or incur an additional fiscal burden. Curiously, the state continues to disregard the very means which Congress has fashioned to take care of the situations which §352.7(g)(7) covers, such as a recipient's loss of his home.

New York has statutory authority for such assistance already in place. Section 350-j of the New York Social Services Law provides in part:

"3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department to children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment."

Moreover, such remedy should be even more appealing to the state since it entitles it to matching federal funds. The state's high court in Jones v. Berman, ___N.Y. 2d___ (June 9, 1975) N.Y.L.J. June 13, 1975, p.1 has rejected the state's fiscal argument in ruling that a state regulation denying the availability of emergency assistance was invalid even under existing state law.

state argues that welfare recipients are faced with Hobson Choices, and refusal to comply with the regulation may result in a denial of eligibility or benefits. Brief, p. 16. The flaw in the state's argument is that in the casescited, Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968) aff'd. 393 U.S. 323 (1969), and New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973),[26] the Court found the rule authorizing the denial of benefits or eligibility had been specifically approved by Congress, whereas in the case at bar, as we have demonstrated, Congress has not authorized recoupment in the AFDC programs.

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26. In Snell, which predated King v. Smith, supra, and Townsend v. Swank, 404 U.S. 282 (1971), provision for recovery from former recipients was specifically set forth in the Act, e.g., 42 U.S.C. §603. In Dublino, the New York rule was upheld since the Court had found in "contrast" to King, Townsend and Remillard, in which the Court "found no room either in the Act's language or legislative history to warrant the State's additional eligibility requirements....[h]ere...the Act allows for complementary state work incentive programs...." 413 U.S. at 422.

POINT II

THE RECOUPMENT REGULATION IS VIOLATIVE OF THE REQUIREMENTS OF THE SOCIAL SECURITY ACT, 42 U.S.C. §602(a)(10) WHICH MANDATE THAT ASSISTANCE BE FURNISHED TO ALL ELIGIBLE INDIVIDUALS

A. The Regulation Violates Federal Statutory Eligibility Standards.

The New York recoupment regulation is also violative of §402(a)(10) of the Social Security Act, 42 U.S.C. §602(a)(10) which requires that a state plan for AFDC must "provide...that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals...."

Plaintiffs argue that 42 U.S.C. §602(a)(10) precludes any eligibility condition or requirement other than one related to need or dependency as defined in the Act, unless congressional approval of such condition is found in the Act or its legislative history. See King v. Smith, 392 U.S. 309 (1968), Townsend v. Swank, 404 U.S. 282 (1971); and Carleson v. Remillard, 406 U.S. 598 (1972) and numerous lower court decisions. Any such unauthorized rule has the necessary effect of denying aid to which an eligible individual is otherwise entitled.

Defendant argues that the above provision is directed toward the question of eligibility to participate in the programs and is not intended to qualify individuals for any particular level of benefits under the program. The level of benefits should not be confused with the amount of benefits due an eligible individual. The level, i.e. 50%, 75% or 100%, is up to the state to set. The amount owed an individual is governed by federal law as well as the state's standard of need and level of benefits. The cases construing §402(a)(10) have applied it to the reduction of benefits by virtue of unauthorized requirements, as well as to outright denials of aid. See Cooper v. Laupheimer, supra; Holloway v. Parham, supra; Doe v. Harder, 310 F. Supp. 302 (D. Conn. 1970) appeal dismissed 399 U.S. 902 (1970); Lopez v. Vowell, supra; New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973);[27] Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972); Doe v. Gillman, 479 F. 2d 646 (8th Cir. 1973). As noted by the Eighth Circuit in Gillman, "A procedure which directly or

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27. In Dublino, the New York rule in question provided for the reduction of the family's grant computed by subtracting the non-complying individual's needs but, as discussed infra, upheld the reduction because it was authorized by Congress.

indirectly lessens the benefits flowing to the dependent child should not be approved." Id at 648.

Nothing in Jefferson v. Hackney, 406 U.S. 535 (1972) is to the contrary. There, appellants sought to use §402(a)(10) as a device to force Texas to apply its percentage reduction factor in a particular way, i.e. to the budget deficit rather than to the standard of need, and the Court ruled that this choice was the state's to make because of its general latitude to determine the formula for computing benefits. 28

The import of all the foregoing decisions is that "need" as defined by state standards (subject to certain federal rules) and "dependency" (e.g., disability, blindness, absence or death of a parent) as defined by

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28. While states, by use of neutral arithmetic factors such as "maximums" or "percentage reductions" may reduce grants to account for budget realities, the level of benefits apply across the board to all recipients regardless of individual circumstances. The "amount of benefits" to an individual under a "maximum" or a "percentage reduction" is dependent upon that individual's need (as defined by the standard and his available income) reduced by the arithmetical factor or non-related need rules. Factors which are individualized, such as the existence of a prior rent payment, cannot properly be characterized as part of the "level of benefits" but are rather more closely related to non-need additional eligibility requirements governing individual entitlement or the extent of that entitlement. See, e.g., 42 U.S.C. §602(a)(19) which

federal standards (which may authorize state limitations) are the only two tests for determining eligibility for federally funded benefits. See, e.g., Doe v. Shapiro, 302 F. Supp. 761 (D. Conn, 1969), appeal dismissed, 396 U.S. 488 (1970); Doe v. Schmidt, 330 F. Supp. 159 (E.D. Wisc. 1971); Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970 Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971) aff'd. sub nom, Carleson v. Taylor, 404 U.S. 980 (1971). See generally, Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith," 118 Penn. L. Rev. 1219 (1970).

Recoupment policies which reduce current grants in order to recover prior rent payments without regard to the availability of the prior payment to meet current needs are by definition unrelated to need. See Comment, 118 Penn. L. Rev. 1219, 1241-42; Cooper v. Laupheimer, supra, 316 F. Supp. at 269. Thus, and unless and

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28. (cont'd)

specifically provides for reduction of an AFDC grant where an individual fails to comply with the work incentive program. Cf, Lopez v. Vowell, 471 F. 2d 690, 693 (5 Cir. 1970) cert, denied, 93 S. Ct. 1903 (1973). In order to be sustained as an individualized determination, the recoupment regulation must be related to need or have been specifically authorized by Congress. As we have demonstrated, the recoupment regulation does not satisfy either requirement.

until such time as Congress authorized the denial or reduction of aid based on a prior rent payment, such a policy conflicts with the command that aid be provided to "all eligible individuals." Two federal courts which have looked in vain for Congressional authorization for recoupment from current grants, ruled that absent such authorization, such a policy was unlawful.[29] Cooper v. Laupheimer, supra; Bradford v. Juras, supra; see also Holloway v. Parham, supra. Indeed, as these courts noted, Congress made a deliberate decision to omit recoupment provisions from the public assistance programs

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29. Congress did, however, specifically qualify beneficiaries; entitlements under the Old Age Insurance Program enacted in 1935, by providing for an adjustment (recoupment) of benefits to recover erroneous prior payments. Publ. L. No. 271, 74th Cong §202(c) 49 Stat. 623. Congress included no such provision in any of the public assistance titles. In 1939, Congress amended Title II to provide more detailed standards under which recoupment from current Social Security benefits would be permissible, including waiver of recoupment under certain circumstances. Publ. L. No. 371, 76th Cong., §204, 53Stat. 1368 (1939), amending §204 of the Act. Congress again failed to include a recoupment provision in the public assistance programs. The same legislation in 1939 added the various income and resources provisions which HEW consistently interpreted as barring recoupment. These legislative developments alone compel the conclusion that Congress did not intend to authorize recoupment from current entitlements in the AFDC program.

established by the Social Security Act.

B. The Recoupment Regulation Frustrates the Primary Purpose of the Act.

The Supreme Court has made clear that the "paramount goal" of the AFDC program is the protection of dependent children. King v. Smith, supra, 392 U.S. at 325. Thus, in King, the Court held that a state could not further its legitimate interest in regulating moral behavior by denying federal AFDC benefits to a child on account of his mother's behavior. In so doing, a state

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(cont'd)
29.) Congress again dealt with recoupment in a Social Security Act program when in October 1972, it added a new title XVI to the Act ("Supplementary Security Income," or SSI program) which, effective January 1, 1974, replaced the current OAA, AB, APTD and AABD programs with a federally administered welfare program for "adult" recipients. Publ L. 92-603, 92nd Cong., §301, 86 Stat. 1329. Thus, §1631(a) of the amended Act specifically provides for recoupment in terms similar to §204. 86 Stat. 1476. Once again Congress failed to include such a provision in the current public assistance titles. Indeed, at the very same time, Congress accepted recoupment from grants in SSI, it rejected a proposal to include recoupment requirements in the AFDC program. Thus, the Senate Finance Committee, with specific reference to HEW's prohibition of recoupment (except in willful withholding of information cases) and express disapproval of that regulation, S. Rep. No. 92-1230, Report on H.R.1., 92nd Cong., 2d Sess. (1972) p. 476, reported to the Senate an amendment to overrule HEW's interpretation of the Act by requiring "in the case of overpayments -- proper adjustment or recovery ... by adjustment in future payments...." The amendments proposed by the Finance Committee were rejected. 118 Cong. Rec. §16801, 16819 (Oct 4, 1972).

would be violating its federal obligation to provide aid to an "eligible individual" (the child) as required by §402(a)(10).

The courts have uniformly ruled that an otherwise eligible child may not be denied AFDC because his mother refused to disclose the name of the child's father. See, e.g., Taylor v. Martin, supra; Meyers v. Juras, 327 F. Supp. 759 (D. Ore. 1971), aff'd., 404 U.S. 803 (1971); Doe v. Swank, 332 F. Supp. 61 (N.D. Ill.), aff'd. sub nom, Weaver v. Doe, 404 U.S. 987 (1971); Doe v. Harder, supra, These decisions are premised on the assumption that since Congress provided AFDC to protect dependent children, it did not intend to discard or dilute that protection because of parental misconduct, and that the denial or dimunition of a welfare grant jeopardizes the eligible child.

The state's recoupment regulation is similarly defective. It seeks to exact restitution from the child for the mother's prior conduct (which may not even have been misconduct at all).[30] As the Court noted in

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30. Both the District Court and the Court of Appeals panel in Hagans v. Wyman, 462 F. 2d 928 (2nd Cir 1972) accurately observed that duplicate rent payments result not only from fault or mismanagement, but that "recipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds allocated, at times it is for reasons beyond their control."

Cooper v. Laupheimer, supra, 316 F. Supp. at 269:

> "(recoupment) punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudulently obtained an extra payment months ago. The state has a legal right to recover from the mother funds which she was not entitled to receive but it cannot recover these funds by reducing current assistance to the child. The target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child."

See also, Bradford v. Juras, supra. HEW acknowledged that the reduction of current grants to recover prior emergency payments needlessly punishes the children and is thus counterproductive to the objectives of that program. In its initial memorandum filed as amicus curiae, HEW informed the court that:

> "The necessary effect of the New York policy is to reduce the amount of aid available for the support of the needy child in those months in which reductions are made to recover the amount of the prior emergency payment. This necessarily means that, during that period, the needly child or children must survive on an amount that falls below the standard of need established by the state. Yet, the needly child has not mismanaged the past assistance payment or in any conscious way created the need for emergency assistance. For this reason, HEW feels that it is clearly contrary to the purposes of the AFDC program to deprive the child by causing a reduction in the current assistance check in order to achieve state interests, in this case, teaching proper money management to welfare recipients and providing for effecient

> utilization of limited state public assistance funds, that can be achieved in ways that do not run contrary to the purposes of the program."[31]

Appellees do not question the power of state welfare officials to recover incorrectly paid assistance from persons who have the ability to pay, or to punish wrongdoers with criminal prosecution for welfare fraud. What is at issue here is the power of the states to reduce current assistance payments to persons concededly eligible

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31. Congress has recognized that recipient mismanagement is at times a problem and established several non-punitive measures to solve the problem (significantly none of which included recoupment) in ways that further, rather than frustrate the primary purposes of the AFDC program.

Section 402(a)(15)(B)(ii) of the Act, 42 U.S.C. §602(a)(15)(B)(ii) and Section 406(b)(2) of the Act, 42 U.S.C. §606(b)(4) provide for "protective" payments made to another individual who... is interested in or concerned with the welfare of such child...," and for vendor payments made directly to a person who has furnished food, living accommodations or services. Congress left no doubt that it intended these provisions to be "a tool to deal with an infrequent but persistent problem of misuse of assistance money." See 45 C.F.R. §234.60, which sets out the requirements for protective and vendor payments. H.R. Rep. No. 544, 90th Cong. 1st Sess. 101-102 (1967). Another non-punitive method available to New York in solving the problem which 18 N.Y.C.R.R. §352.7(g)(7) deals with is "emergency assistance" pursuant to §406(e) of the Social Security Act, 42 U.S.C. §606(e). New York has statutory authority for such assistance. (See New York Social Services Law §350-j) and notwithstanding the state's reluctance to utilize such authority, the New York Courts have consistently mandated such assistance to provide living arrangements or avoid destitution of AFDC families. See e.g., Young v. Shuart, 67 Misc. 2d 689, aff'd. 39 AD 2d 724 (2d Dept. 1971).

for such grants under state and federal law, for the purpose of recouping a prior emergency rent payment intentionally made to such persons by state or local welfare departments without regard to its current availability or the effect that such reduction will have on their ability to purchase items of daily need.[32]

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32. In assessing the destructive effect of recoupment it should be noted that the states recoupment practices are not confined to recovering emergency rent payments expended to prevent eviction. As a consequence of runaway utility rates, recipients often fall into arrears on their utility bills. To prevent a shut off of this essential service recipients may be given an emergency utility allowance. This emergency payment is also recouped over a six month period. Thus it is a common practice for a family to be subjected to multiple recoupments simultaneously with devastating consequences on the families ability to sustain themselves. See 18 N.Y.C.R.R. §352.7(g)(5).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

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September 16, 1975

Respectfully submitted,

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